CC: TO JUDGE PM

Honorable Robert S. Lasnik

FILED ENTERED
LODGED RECEIVED
MAR 25 2002 PM
AT SEATTLE
CLERK U S DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CYBERSPACE.COM, LLC, et al,

Defendants.

Case No. C00-1806-L

FTC OPPOSITION TO EISENBERG DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CV 00-01806 #00000148

Federal Trade Commission
600 Pennsylvania Ave , NW
Washington, DC 20580
202-326-3338 (Ms. Guerard)

148

TABLE OF CONTENTS

Federal Trade Commission
600 Pennsylvania Ave , NW
Washington, DC 20580
202-326-3338 (Ms Guerard)

TABLE OF AUTHORITIES

Cases

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
202-326-3338 (Ms Guerard)

Statutes

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
202-326-3338 (Ms Guerard)

I. SUMMARY OF FTC OPPOSITION.

The motion for summary judgment by defendants Ian Eisenberg, French Dreams, and Olympic Telecommunications, Inc. ("Eisenberg defendants" or "Eisenberg") reflects a misunderstanding of the FTC's complaint, a misrepresentation of facts; and a misstatement of the applicable FTC law. Contrary to Eisenberg's assertion that "there is no competent evidence that defendants' practices were deceptive or violated the FTC Act" [Eisenberg motion, p. 2, l. 3-4], the admissible evidence in support of the FTC's three complaint counts is extensive. The Court should deny Eisenberg's summary judgment motion. Moreover, the FTC's motion for summary judgment shows there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Summary judgment should be entered in the Commission's favor.[1]

II. AMPLE ADMISSIBLE EVIDENCE SUPPORTS EACH OF THE FTC'S COMPLAINT ALLEGATIONS.[2]

---

[1] In support of its motion for summary judgment, the FTC filed eight volumes of exhibits, consisting of, *inter alia*, deposition excerpts, sworn affidavits and declarations, and documents received during discovery from defendants and third parties The FTC is submitting additional exhibits in support of its Oppositions to the defendants' two motions for summary judgment In its Oppositions, the FTC references both the Volume Number ("Vol ") and the exhibit number ("Ex ") when describing a document, deposition, or declaration

In addition, the declaration of attorney Michael Goodman sets forth as an Exhibit List the exhibits, by volume number and exhibit number, on which the FTC is relying in its motion for summary judgment and its oppositions to defendants' summary judgment motions. The declaration is Vol IX, Ex 315, and the list of exhibits is at ¶¶ 10-21

[2] An incorrect statement early in the Eisenberg motion is one of many examples that show that Eisenberg misunderstands the FTC's evidence and law Eisenberg states that the FTC has not alleged material misrepresentations [Eisenberg motion, p 1, l. 8-9]. This is inaccurate All three complaint counts arise from defendants' material misrepresentations Under FTC deception law, the FTC must show that a representation or omission is likely to mislead consumers acting reasonably under the circumstances and that the representation or omission is material– *i e* , is important to consumers and therefore likely to affect their decision *FTC v Pantron I Corp* , 33 F 3d 1088, 1095 (9th Cir 1994) *See FTC motion for summary judgment*, pp 20-21.

Eisenberg repeatedly references only Cyberspace in his motion, as if Cyberspace were the only entity sending out promotions· "Cyberspace's first marketing venture was an electronic yellow pages promotion similar to that of yp net " [Eisenberg motion, p 3, l. 2, affidavit at ¶ 8] The motion and affidavit are inaccurate The initial promotion was by Essex Enterprises, one of the four subsidiaries owned by defendant Electronic Publishing Ventures ("EPV") [Vol IV, Ex 260, *H Depo*, p 25, l. 8-11; Vol IX, Ex. 260, p. 62, l. 8-10; Vol. IX, Ex 264, *R Depo*, p. 26, l 13-18]

A. The Count I Charge Is Supported.

1. Defendants Made The "Obligated to Pay" Representation.

Eisenberg appears to concede that defendants made the representation alleged in Count I: that consumers who received defendants' charges on a bill are legally obligated to pay for those charges As stated in Eisenberg's motion, "Once subscribers negotiated the check, Cyberspace was entirely within its rights to represent to subscribers that the subscriber was legally obligated to pay for those charges." [Eisenberg motion, p. 16, l. 15-17] According to Eisenberg, this representation was true. Eisenberg maintains that consumers were legally obligated to pay because the terms of the offer were "clearly" disclosed on the back of the check and invoice-like

---

The Eisenberg motion and affidavit also incorrectly state that Don Reese introduced Eisenberg to Hebard [Eisenberg motion, p. 3, l 4-5; affidavit, ¶ 6] This is inaccurate. Both Eisenberg and Hebard testified at their respective depositions that they met each other through Gene Hirai [Vol. IX, Ex 262, *E Depo*, p. 218, l 16, Vol IV, Ex. 260, *H Depo*, p 23, l 2; Vol IX, Ex. 260, p 64, l. 5].

Eisenberg inaccurately states that the solicitation check was an idea urged upon him by Don Reese [Eisenberg motion, p. 3, l 1-4, affidavit, ¶ 5] In fact, it was Eisenberg's idea to use the solicitation check Eisenberg, in his capacity as President of defendant Olympic Telecommunications, Inc , testified that when he saw the YP-Net check he thought it was "creative" and that the method of gaining customers through a check was "interesting " [Vol IX, Ex 261, p 82, l 5-11, p 82, l 17 - p 83, l 3, p. 83, l. 10 - p 84, l. 8] Reese confirms that Eisenberg said he thought the YP-Net solicitation check was a "great idea " [Vol. IX, Ex. 264, p 32, l 14 - p 33, l 2]. Hebard testified that the check idea was Eisenberg's [Vol. IX, Ex 260, p 60, l 2-12]

The motion and affidavit inaccurately state that Eisenberg lacked "direct marketing experience." [Motion, p 3, l 2-3, affidavit, ¶ 5] In fact, Eisenberg testified that he owned Pacific Rim, which he described as an advertising agency [Vol IX, Ex 262, p 216, l 1-10] Also, Eisenberg used direct mail pieces to market audiotext services offered by his company, Common Concerns [Vol IX, Ex 264, *R Depo*, p 116, l. 9-11]. It is inaccurate to state that Eisenberg lacked direct marketing experience

An additional factual defect in the Eisenberg motion and affidavit concerns the mailings by Cyberspace The motion makes certain assertions about the volume and dates of Cyberspace mailings and response rates [Eisenberg motion, p. 4-5] by relying on Eisenberg's affidavit, ¶¶ 23-25. However, the affidavit does not reflect personal knowledge by Eisenberg. Eisenberg references a draft letter from attorney Lew Rose to the FTC with mailing statistics, which Eisenberg states he cannot verify, and an unseen affidavit by Hebard, as the basis for the Cyberspace mailing statistics Moreover, in responding to a request for admission, Eisenberg stated he did not know if the number in the attachment to the Lew Rose letter to the FTC was correct [Vol. III, Ex 256, E Adm 47].

form, and on an insert [3] However, defendants' inconspicuous fine-print disclosures are an insufficient basis for this obligation.

2. The "Obligated to Pay" Representation Is False.

Consumers who cashed or deposited defendants' checks were not legally obligated to pay the EPV charges on their telephone bill It does not matter how understandable terms of an offer are, if the terms are not noticed. Under FTC law, consumers are not bound to the terms of an offer where they are not able to knowingly agree to the offer because the terms are inconspicuous [FTC motion for summary judgment, p. 18].

Eisenberg's two cited cases are not on point [Eisenberg motion, p. 16, l. 13-14]. In *Golenia*, the court held that a contract clause was enforceable despite plaintiff's argument that he had not read the contract, "given the bold-faced all-caps admonition in the agreement not to sign it prior to reading and understanding its terms." *Golenia v Baker Toyota*, 915 F. Supp. 201, 204 (S.D. Cal. 1996). Here, there were no bold-faced all-caps admonitions to read what one consumer deponent characterized as "legalese" and "mumbo jumbo" [Vol. V, Ex. 266, *Coram Depo*, p 55, l. 25 - p 54, l. 7]; nor was there anything on the face of the check or the invoice-like form to warn consumers of the financial consequences of cashing or depositing the check [*See sample checks at* Vol. VIII, Exs. 61-65]. When asked about a specific check and invoice-form [Vol. VIII, Ex. 62, H 8231], Hebard agreed that there was nothing on the front that reflected the product being sold or the price of the product [Vol. IX, Ex. 260, p. 80, l. 24 - p. 81, l. 8] Consumers do not expect that a contract will be in fine print on the back of a check, as pointed

---

[3] Not all the mailings included the insert Eisenberg testified, ". . . there's some sort of an issue with people getting checks without inserts, that the mail house did something wrong" [Vol IV, Ex. 262, p 108, l 21-23] On one day alone, Eisenberg personally focused on complaints from two consumers who apparently received solicitation checks without the inserts Eisenberg told Diane Capasso, who worked for Hebard, to handle each complaint [Vol. II, Exs 153, 154, *discussed at* Vol. IV, Ex. 262, *E Depo*, p. 108, l. 6 - p 109, l 18, p 110, l. 11 - p 111, l 23]. Hebard also acknowledged that some checks were mailed without inserts [Vol. III, Ex 252, H Adm 224]

out by several deponents. Ms. Schoomer, whose company already had Internet access, stated "we're not expecting to receive a check and that check be a contract " [Vol. IX, Ex. 268, p. 44, l. 2-3]. Mr. Coram, who did not have a computer and thus could not use defendants' services, testified that "I don't think I would enter into an agreement via a check . . . All the other agreements that I have here are . . . not on the back of a check." [Vol IX, Ex. 266, p. 38, l 16-21]. He explained that the contracts he has are "not that small of print. It's not confined to that size paper or anything " [Vol. IX, Ex. 266, p. 54, l. 13-17].

The other case Eisenberg cites, *General Insurance*, is equally unavailing First, the court relies on Washington state law, which is not controlling in a FTC case based on deception. Second, even if Washington law were applicable, two cases cited in *General Insurance* support the FTC's position. In one case, *National Bank v. Equity Investors*, 81 Wash.2d 886, 912-13, 506 P 2d 20 (1973), the court held that "one cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand " The FTC contends that the checks, with their invoice-like forms, deceived consumers. *National Bank* supports the FTC's position, not Eisenberg's, because deceit resulted in consumers' cashing or depositing defendants' checks without knowing about defendants' terms buried in inconspicuous print. As the deponents testified, one doesn't expect a contract to be printed in fine print on the back of a check.

In the second case cited in *General Insurance*, *Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 382-84, 745 P.2d 37 (1987), the court stated that the relevant inquiry included whether the document was plain and unambiguous and whether the party was a victim of fraud, deceit, or coercion. The EPV consumers were victims of defendants' deceptive marketing practices. The marketing material was not plain and unambiguous. The two cases relied on by *General Insurance* support the FTC's position that the EPV consumers were not obligated to pay defendants' charges because there was deception and therefore no agreement.

Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580
202-326-3338 (Ms Guerard)

3. The FTC Has Sufficient Admissible Evidence on Count I.

The FTC has ample admissible evidence to show that defendants represented to consumers that they were obligated to pay defendants' charges. This representation was made on the Olympic billing page, which included the name of the EPV subsidiary and the amount and date of the charge. Examples of the Olympic billing page are: Vol. V, Ex. 268, p. CLS 15018; Vol. V, Ex. 266, p. H 6634; Vol V, Ex. 267, p. CJR 15208; Vol. VI, Ex. 272, p. H 7828. Defendants' customer service representatives ("CSRs") also made this representation when they told consumers who called about unexplained charges that they had to pay. According to declarant Epstein, a CSR "insisted that I was obligated to pay the other month's charge since I had endorsed and deposited her company's promotional check." [Vol. VI, Ex. 275, ¶ 8]. Declarant Hunter requested a refund and was told that cashing the check "had obligated my company to pay the charges." [Vol. VI, Ex. 282, ¶ 7]. One CSR told declarant Rutkowski that his company "was obligated to pay the charges." [Vol. VI, Ex. 289, ¶ 7]. Deponent Robrecht testified that a Cyberspace representative told him that his company was responsible for the charges and that the CSR "led me to believe that I owed this Internet service bill and that they were not going to remove the charges." [Vol. V, Ex. 267, p. 21, l. 7 - p. 22, l. 1; p. 22, l. 9-15].[4]

B. The Count II Charge Is Supported.

Contrary to Eisenberg's "no evidence whatsoever" claim, there is more than enough admissible evidence to support Count II, which alleges that defendants' representation that the solicitation check is a refund, rebate, receivable, or other payment for services based on a prior or ongoing business relationship is deceptive [Eisenberg motion, p. 17, l. 3-5]. The check, which

---

[4] *See also the following 13 declarations in Volume VI* Ex 270, Achey Dec, ¶ 5, Ex 271, Addor Dec, ¶ 5, Ex 276, Ewing Dec, ¶ 8, Ex 278, Glass Dec, ¶¶ 4, 6, Ex 280, Hicks Dec, ¶ 4, Ex 283, Hussain Dec, ¶ 6, Ex 285, Leigh Dec, ¶ 5, Ex 287, Madden Dec, ¶ 7, Ex 288, Rostvold Dec, ¶ 7; Ex 290, Santos Dec, ¶ 6, Ex 291, Shedivy Dec, ¶ 5, Ex 296, W Wood Dec, ¶ 8, Ex 298, Yang Dec, ¶ 7. *Also see the following two depositions in Volume V* Ex 267, *Robrecht Depo*, p 21, l 7-17; p 22, l 9-15, Ex 268, *Schoomer Depo*, p 35, l. 19 - p 36, l 1

includes the recipient's name, address and telephone number, attached to an invoice-like form, with its various columns and descriptors such as "invoice number", "reference number" and "account number", represents to consumers that the check is based on some prior or ongoing relationship. Examples of the form are: Vol. I, Ex. 68, H 8805; Vol. VI, Ex. 279, FTC 1696, Vol. VI, Ex. 287, E 25355; Vol VI, Ex. 289, H 6876. The small amount of the check, coupled with the invoice-like form, and the complete absence of any explanation of the offer on the front of the check or the front of the form, led many consumers to understand that the check was a refund, rebate, or some other kind of payment based on a prior or existing relationship.

Numerous consumers support the FTC's analysis,[5] as does deposition testimony by Don Reese and by Hebard. Don Reese testified that a "common claim" from consumers was that they thought the check was some sort of refund [Vol. V, Ex. 264, p. 102, l. 12-15]. Hebard testified that he assumed his office responded to complaints from consumers who thought the check was some kind of refund or rebate [Vol. IV, Ex. 260, p. 126, l. 23-25]. A refund typically comes only from a company with which a person has had, or has, a business relationship. Declarant Shedivy states the company's bookkeeper thought the check "was a payment from one of my company's cash customers." [Vol. VI, Ex. 291, ¶ 7]. Declarant Gregory's husband thought the $3.50 check was a rebate for a book he had ordered [Vol. VI, Ex. 279, ¶ 7]. Deponent Schoomer explained that her company had never received a rebate or refund from someone they were not already doing business with, and that if they received a rebate check "it's an assumption that we've

---

[5] *E g* , Deponent Robrecht, who had been an accountant for 30 years, thought the Cyberspace check was a rebate check because of "the amount of the check, $3 50" [Vol V, Ex 267, p 44, l 13-24] *See also the following declarations, all of which are in Volume VI* Ex 270, Achey Dec, ¶ 3, Ex 271, Addor Dec, ¶ 3, Ex. 273, Clifton Dec, ¶ 6; Ex 274, Davis Dec, ¶ 9; Ex 275, Epstein Dec, ¶¶ 6, 11, Ex 276, Ewing Dec, ¶¶ 7, 10, Ex. 278, Glass Dec, ¶ 7, Ex 280, Hicks Dec, ¶¶ 5, 8, Ex 281, Hoadley Dec, ¶ 8, Ex 282, Hunter Dec, ¶ 8, Ex 284, Katz Dec, ¶¶ 6, 10, Ex 286, Loepkey Dec, ¶ 7, Ex 289, Rutkowski Dec, ¶ 9, Ex 290, Santos Dec, ¶ 7; Ex 292, Silva Dec, ¶ 9, Ex 295, R. Wood Dec, ¶ 8, Ex 296, W Wood Dec, ¶ 9, *and the following depositions, which are in Volume V* Ex 266, *Coram Depo*, p 57, l 18-25, Ex 268, *Schoomer Depo*, p. 69, l 10 - p. 70, l 4

already got a relationship with that company." [Vol. IX, Ex. 268, p. 68, l. 6-8; p. 69, l. 4-7; *see also*, p. 116, l. 9-21].

Eisenberg's argument that the word "rebate" appears on only a few versions of the check stub is without legal merit [Eisenberg motion, p. 17, l. 5-8]. Under FTC law, the court must consider the entire solicitation – in this case, the check for the small amount, with the consumer's telephone number, and the appearance of the attached invoice-like form and its business-like categories. Eisenberg tries to isolate the check from its attachment, but it is well-settled FTC law that the solicitation is to be taken as a whole, not parsed into separate parts. *See, e.g., Removatron Intern Corp. v FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989) ("The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context") (quoting *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983)); *see also FTC v. Five-Star Auto Club, Inc.*, 97 F.Supp.2d 502, 528 (S.D.N.Y. 2000); *FTC v. Patriot Alcohol Testers, Inc* , 798 F.Supp. 851, 855 (D.Mass. 1992). Moreover, the "net general impression" analysis under FTC law necessarily permits the Court to look beyond the text of a solicitation to "the message conveyed visually" by the solicitation's overall presentation.[6] *American Home Products Corp. v. FTC*, 695 F.2d 681, 688 (3rd Cir. 1982) (citing *FTC v. Colgate-Palmolive Co* , 380 U.S. 374, 385 (1965)). Without this emphasis on a solicitation's net impression, "the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words." *Id.* The same is true for printed words. Inconspicuous fine print is but one way for such "crafty advertisers" to deceive consumers. The deception standard is broad enough to address solicitations that create a deceptive impression while burying material disclosures in inconspicuous fine print.

---

[6] Nowhere in his motion does Eisenberg address the front of the invoice-form, which is an integral part of the defendants' marketing piece

C. The Count III Charge Is Supported.

Eisenberg also argues, incorrectly, that there is "no evidence to support" Count III, which alleges that defendants failed to disclose clearly and conspicuously the consequences of cashing or depositing the solicitation check [Eisenberg motion, p. 18, l. 11-12].

1. The Disclosures Were Not Clear And Conspicuous.

It is telling that all three consumer deponents indicated that they, or employees at their companies, had not read the disclosure statement–presumably because it was not conspicuous.[7] Whether or not the deponents would have understood the disclosure had they read it is irrelevant. They or the other employees did not read the statement because it was not conspicuous enough to be seen.

Ample admissible evidence shows that consumers and businesses deposited the checks because they did not see the fine print disclosures–i.e., the disclosures were not "conspicuous", even if they were understandable to someone who had as much time as he or she needed to study them in a deposition. According to Don Reese, the number one complaint was from consumers who did not know why they were being charged by Olympic on behalf of the EPV subsidiaries [Vol. IX, Ex. 264, p. 66, l. 11-19]. This is borne out by consumer declarations and depositions.[8]

---

[7] One of the deponents used a magnifying glass at his deposition to read the fine print on the back of a sample Cyberspace check [Vol IX, Ex 267, *Robrecht Depo*, p. 78, l 23 - p 80, l 5].

[8] *See the following declarations, all of which are in Volume VI*: Ex 270, Achey Dec, ¶ 4, Ex. 271, Addor Dec, ¶ 5; Ex 272, Brynn Dec, ¶ 4, Ex 273, Clifton Dec, ¶ 3; Ex 274, Davis Dec, ¶ 5; Ex 275, Epstein Dec, ¶ 3, Ex 276, Ewing Dec, ¶ 6; Ex 277, Fanning Dec, ¶ 3, Ex 278, Glass Dec, ¶¶ 3, 4, Ex 279, Gregory Dec, ¶ 3, Ex 280, Hicks Dec, ¶ 3; Ex 281, Hoadley Dec, ¶ 4; Ex 282, Hunter Dec, ¶ 4; Ex 283, Hussain Dec, ¶ 3; Ex. 284, Katz Dec, ¶ 4, Ex 285, Leigh Dec, ¶ 3, Ex 286, Loepkey Dec, ¶ 4, Ex 287, Madden Dec, ¶ 5, Ex. 288, Rostvold Dec, ¶ 4, Ex 289, Rutkowski Dec, ¶ 3, Ex. 290, Santos Dec, ¶ 3, Ex 291, Shedivy Dec, ¶ 3, Ex 292, Silva Dec, ¶ 3, Ex. 293, Stephan Dec, ¶ 4, Ex 294, Tucker Dec, ¶ 3, Ex. 295, R. Wood Dec, ¶ 3, Ex 296, W. Wood Dec, ¶ 8, Ex 298, Yang Dec, ¶ 4. *See also the following deposition excerpts, which are in Volume V* Ex 266, *Coram Depo*, p. 16, l. 13 - p 17, l 1, Ex. 267, *Robrecht Depo*, p 14, l. 9-15; p. 17, l. 7-17, p 21, l. 1-9; Ex. 268, *Schoomer Depo*, p. 32, l. 18 - p 33, l 6, p 34, l 16 - p 35, l. 5

Consumers did not know why they were being billed because they had not seen the disclosures–they had deposited the checks without noticing the inconspicuous fine print.

Defendants' own records show that consumers did not realize they were signing up for Internet-related services when they cashed defendants' check. For instance, Exhibit 95, the booklet provided by Eisenberg and Hebard to potential buyers of the EPV subsidiaries, states that the company "*believes that a number of customers sign up for the* [a word is missing in the original] *without realizing that when they deposit the check, that they have ordered Internet service* [Vol. II, Ex. 95, E 20094 emphasis supplied]. Hebard agreed that sentence would make sense if the word "product" were inserted for the missing word [Vol. IV, Ex. 260, p. 182, l. 10-17]. Exhibit 74, E 20717 (Vol. I), an email sent to Eisenberg and Hebard in November 1999, includes as a possible answer to a reporter's question: "We have processed hundreds of thousands of dollars of refunds for customers who cashed the check without reading the insert or the disclosures on its face and signature block (this may be the wrong message to send)." Don Reese sent an email to Eisenberg and Hebard in December 1999 in which he opined that the only reason the solicitation checks were being cashed was because the accounts receivables department "does not pay attention." At his deposition, Reese explained that he was saying that the accounts receivable departments did not know what the check represented, and that "very few people, very few people who cashed the check knew that they were signing up for internet service." [Vol. II, Ex. 163, Vol. V, Ex. 264, p. 64, l. 16-20; p. 65, l. 17 - p. 66, l. 9; p. 182, l. 5-23].

2. The YP-Net Settlement Does Not Support Eisenberg's Argument.

The settlement in *FTC v YP.Net, Inc.* is not on point. [Eisenberg motion, p. 17, l. 24 - p. 18, l. 1, p 18, fn. 22]. First, a settlement reached in an unrelated matter is irrelevant to the action before this Court. Second, Eisenberg incorrectly describes the settlement, even if it were relevant. Contrary to the claim made by Eisenberg, the FTC **did not** take the position that a

check promotion is not deceptive if disclosures are on the front of the check [Jacobs Declaration, Ex. A, p. 5]. The settlement allowed YP.Net to use check promotions only if two conditions were met 1) certain disclosures were on the front of the check, **and** 2) those disclosures were *clear and conspicuous*. The mere presence of a disclosure, even on the front of a check, will not cure deceptive representations. Only **clear and conspicuous** disclosures can possibly mitigate deception. Defendants' fine-print disclosures hidden on the back of the solicitation fall short of this standard.

3. The Fine Print On The "Chase" Solicitation Check Deceived The Eisenberg Legal Team.

Eisenberg argues that a solicitation check from Chase Bank shows that "one of the nation's largest financial institutions" decided that disclosures on the back of a check were more clear and conspicuous than placing them on the front [Eisenberg motion, p. 18, l. 7-10]. The check deceived the Eisenberg lawyers, who thought the check was from Chase Bank. It was not Fine print on the back of the form attached to the check disclosed that MemberWorks was the true offeror of this promotion.[9] The MemberWorks check deceived the Eisenberg legal team, just as the EPV checks deceived thousands of consumers.

D. The FTC Has Numerous Categories Of Evidence Showing That Defendants' Representations Were Likely To Deceive Reasonable Consumers.

Eisenberg incorrectly states the FTC has only two categories of evidence to show likely deception: consumer complaints, which defendants argue may not be considered for the truth of the matter, and the Starnet records, which Eisenberg claims, without explanation, are inadmissible [Eisenberg motion, p 9, l. 1-5]. Both points are incorrect. Moreover, the FTC has

[9] MemberWorks is hardly an exemplary model It hid its name in fine print. Moreover, four states have taken legal action against MemberWorks for its telemarketing practices. *See Declaration of Michael Goodman*, Vol IX, Ex 315, ¶¶ 2-9 and attached settlements and assurances of voluntary compliance

submitted numerous categories of evidence to support its allegations that defendants deceived consumers.

First, the FTC submitted examples of defendants' solicitation checks and invoice-forms [Vol. VIII, Exs. 61-65] and the Olympic billing page [Vol. V, Ex. 268, CLS 15018; Vol. V, Ex. 266, H 6634; Vol. V, Ex 267, CJR 15208; Vol. VI, Ex. 272, H 7828; Vol. VI, Ex 281, H 7863; and Vol. VI, Ex. 284, H 7803], which make the representations alleged in the complaint.

Second, the FTC submitted excerpts from three consumer depositions, each of which shows that the deponents, or their employees, deposited the solicitation checks, either because they thought it was a rebate or refund, or because they did not notice the disclosures, presumably because they were not conspicuous·

> In response to a question from Eisenberg's counsel, deponent Coram stated his brother thought it was a rebate check for the telephone [Vol. V, Ex. 266, p. 57, l. 18-25]
>
> Deponent Robrecht testified that the $3 50 check "appeared to me to be a rebate check, which I subsequently deposited into our operating account." [Vol. V, Ex. 267, p 9, l 10-12; *see also*, p. 44, l. 13-24].
>
> Deponent Schoomer responded "yes" to the question "you assumed it was a rebate or a refund?" [Vol. V, Ex. 268, p 69, l 10 - p. 70, l. 4; *see also*, Vol. IX, p. 63, l. 11 - p. 64, l. 13].

The fact that had these deponents read the statement they would have understood it and not deposited the check is irrelevant. They or their employees did not read the statement because it was not conspicuous enough to be seen.

Third, the FTC submitted the sworn declarations of 28 consumers supporting the FTC's complaint allegations Some consumers thought the solicitation check was a rebate, refund, or payment based on a prior or ongoing business relationship; others did not understand the purpose of the check because the consequences of cashing or depositing the check were not disclosed in a clear and conspicuous manner [Vol. VI, Ex. 270-298].

Fourth, the FTC has copied from defendants hundreds of consumer complaints, a few of which are included in the eight volumes of exhibits the FTC submitted in support of its motion

for summary judgment.[10] Consumer complaints may be considered for the truth of the matter, as well as to show that defendants were on notice that consumers were deceived.[11]

Fifth, testimony and documents from defendants themselves support the complaint allegations and show that consumers were deceived because they did not notice the disclosures–presumably because they were not conspicuous. For instance:

* Hebard testified that he assumed that consumers who deposited the check and did not want the service "had not read any of the portions of the promotion." [Vol. IV, Ex 260, p 127, l. 17-20]. Later, when asked if it was his experience that some consumers did not read the disclosure on the back of the check, Hebard responded that he understood that "some consumers hadn't read the promotion at all." [Vol. IV, Ex. 260, p. 131, l 14-18].

---

[10] The FTC summary judgment exhibits include the following consumer complaints, which are just a small sample of the "boxloads" of consumer complaints defendants received *See* declaration of Alexandra Magill, Vol VI, Ex 305, ¶ 2-3. These complaints were used in the depositions For instance, Fena Hasbrook's complaint to the Federal Communications Commission was forwarded to defendant Olympic Ms Hasbrook, officer manager, complained that the owner of the business "thought the small amount was for a refund she had submitted Most people are very busy and do [sic] don't read all the mail from cover to cover In this case, she didn't think it necessary to read what accompanied the check because she thought it to be her refund" [Vol. I, Ex 77 at E 25304] Lucille Daub also wrote the FCC, which forwarded her complaint to Olympic Ms Daub explained that neither she nor her husband recalled the check, "but we apparently did cash it, thinking it was some sort of refund " [Vol. II, Ex 135 at H 7417]. Pam Ritter of Carolina Mop wrote directly to Olympic asking for a refund of $123 40 less the $3 50 check She stated that "we did not knowingly open this account" and that an employee had questioned the check but did not read the back of the check "In fact, I doubt any of us would have taken the time to read the BACK OF A CHECK!" [Vol VIII, Ex 136 at H 7499] The complaint of Malon Metz eventually reached Eisenberg personally. Metz stated he had been with the postal service for 20 years and "this is the most underhanded marketing tool I've seen in years " [Vol II, Ex 153 at DR 6806-07] Another complaint that reached Eisenberg was from Daniel Underhill, who wrote "I scratched my head for the longest time trying to figure out who the heck I had invoiced for $3 50 or for what rebate I was receiving this check " He then pointed out that "you are clearly banking on the notion that most people won't examine too closely as to what the check is for and who it is from and will just cash it with their next bank deposit " [Vol II, Ex 154, DR 6454]

[11] Eisenberg incorrectly states that consumer complaints have never been admitted into evidence for the truth of the matter, citing *FTC v Figgie International, Inc* , 994 F 2d 595 (9th Cir. 1993) In fact, in *Figgie* the Ninth Circuit approved the District Court's admission, under Federal Rules of Evidence 803(24) and 1000, of the declaration of an FTC investigator summarizing 127 consumer complaints to show the truth of the matter Over the objection of Figgie, who argued that consumer complaints were hearsay, the court held that the letters were admissible to prove the prices paid by consumers 994 F 2d at 608-610

* Ex. 95, E 20094 (Vol. II), the written presentation Eisenberg and Hebard distributed to potential buyers of the EPV venture, explains that consumers deposited the solicitation checks without realizing that they were signing up for Internet service

* The sample answer to a reporter's question states that defendants provided hundreds of thousands of dollars of refunds to customers who cashed the check "without reading the inserts or the disclosures on its face and signature block." [Vol. I, Ex. 74, E 20717].[12]

* Don Reese notified Eisenberg and Hebard in December 1999 that, in his opinion, the only reason that the solicitation checks were being cashed by recipients is that the accounts receivables department "does not pay attention" [Vol. II, Ex. 163; Vol. V, Ex. 264, *R Depo*, p. 64, l. 16-20; p. 65, l. 17 - p. 66, l 9]. Reese testified that he was saying that the accounts receivable departments did not know what the check represented. He knew this from the number of complaints, comments from the customer service representatives and their supervisors, the LEC complaints, and what he heard consumers saying when he listened to the consumers speaking with Olympic's CSRs [Vol. V, Ex. 264, p. 182, l. 5-23].

Sixth, less than one percent of billed consumers used defendants' Internet access service [Vol. VI, Ex. 302, Tobin Dec, ¶ 42]. This shows that consumers did not knowingly sign up for defendants' internet access Consumers did not know they were signing up for Internet access because the terms of the offer were contained in minuscule print on the back of the solicitation.

Starnet invoice records show that approximately 2000 different EPV consumers used defendants' service to access the Internet between June 1999 and September 2000; during the

---

[12] Hebard testified in considerable detail about this document, which came from his financial officer, agreeing with all of the answers–except he stated that he did not know that consumers cashed the check without reading the insert, the kind of answer one would expect from a defendant at a deposition [Vol IX, Ex 260, p. 109, l 9 - p 113, l. 5]

same period, defendants' customer service database shows that Olympic billed approximately 247,000 different customers on behalf of the EPV venture [Vol. VI, Ex. 302, Tobin Dec, ¶ 19] [13] Depending on the sample measured, surveys show that most consumers who have Internet access log on to the internet. For instance, according to a survey of Internet usage habits by the Yankee Group, in 1998 approximately 100% of the surveyed households capable of accessing the Internet did so at least one time in a given month; in 2000, approximately 98% logged on.[14]

Deposition testimony and other documents confirm the low usage. Hebard admitted that it was brought to his attention that very few billed consumers were actually logging on to the Internet using the EPV software; that potential buyers had expressed concern that so few EPV consumers had actually logged on; and that he himself was concerned that so few EPV consumers were logging on [Vol III, Ex. 252, H Adm 274-276].[15] Eisenberg and Hebard

---

[13] Eisenberg makes two incorrect arguments about the Starnet invoices First, Eisenberg states, without explanation, that the records are inadmissible The FTC disagrees The records [Vol I, Ex 4] were authenticated by Starnet at its Rule 30(b)(6) deposition [Vol IX, Ex 265 (Malecki), p 40, l 4-25, (Van Deren), p 35, l 3-21] Eisenberg and Hebard both admitted that they, or their employees, received the Starnet invoices [Vol III, Ex 256, E Adm 119, 121; Ex 251, H Adm 99, 101] They are admissible as business records under Rule 803(6) of the Federal Rules of Evidence *See declaration of Tom Van Deren*, Vol IX, Ex 312, ¶¶ 2, 5-11

Second, Eisenberg erroneously implies that defendants paid Starnet for each EPV customer, regardless of whether that consumer accessed Internet [Eisenberg motion, p 7, l 7-8] It is true that they paid Starnet for each customer–but just for the email and web page accounts Defendants paid Starnet for Internet access only if the consumer logged on According to Tom Van Deren, Starnet's Manager of Sales and Marketing, defendants paid Starnet $ 25 for each email account and $ 20 for each web page account [Vol IX, Ex 312, Van Deren Dec, ¶ 11] However, defendants paid Starnet only if the consumer logged onto the Internet [Vol V, Ex 265, *Starnet Depo (Van Deren)*, p 25, l 18 - p. 26, l 21, *see also testimony of Don Reese* Vol V, Ex 264, p 185, l 25 - p 189, l 18]

[14] Vol. IX, Ex 314, ¶ 4 [Declaration of Robert Lancaster, Yankee Group Research] *See also the declaration from* Barbara Jarzab, Nielsen/NetRatings showing that in September, 2000, approximately 60% of people who had access to the Internet from their homes logged on to the Internet [Vol IX, Ex 316, ¶ 3] By contrast, in September, 2000, defendants billed approximately 15,000 consumers [Vol. VI, Ex. 302, Tobin Dec ¶ 18], there were 56 EPV consumers who logged on during that period [Ex 302, Tobin Dec, ¶ 41] Finally, according to an informal survey by the Executive Director of the Washington Association of Internet Service Providers, based in the State of Washington, the number of consumers who have access to the Internet and do not log on is almost too small to measure [Vol IX, Ex 313, ¶ 4].

[15] Hebard's deposition testimony is consistent with his admissions. Hebard explained that some of the potential buyers were concerned about the quality of the business if consumers were not logging on and using the

discussed this low usage in conference calls in which Reese participated [Vol. V, Ex. 264, *R Depo*, p. 108, l. 6-23]. Hebard confirmed that he discussed usage issues with Eisenberg [Vol IV, Ex. 260, *H Depo*, p. 143, l 5-15]. In September 1999, Hebard sent an email to Don Reese and Eisenberg, in which he commented upon a previous email from Reese. In his email, Hebard states "our churn factor has to do with *no usage*, not whether we are the best ISP." [Vol. II, Ex. 181, p. 1 (emphasis added)]. Reese testified that Hebard was explaining that "people are canceling because they don't know that they are users. They don't know that they're subscribing to the service." [Vol. V, Ex. 264, *R Depo*, p. 192, l. 1-3; l. 11-22]. In a different email, Hebard suggested going to Starnet "and beg them to bill us for more users " [Vol. I, Ex. 81, DR 5070]. In their written presentation to potential buyers, Eisenberg and Hebard stated that a number of consumers deposit the check "without realizing that when they deposit the check, that they have ordered Internet service." [Vol. II, Ex. 95, E 20094]. Eisenberg and Hebard received copies of an email in February 2000 in which Don Reese stated that not one of the subscribers on a list from an auditor "has ever logged on to our Radius Server." [Vol. VIII, Ex. 83, DR 4683; Vol V, Ex. 264, *R Depo*, p. 112, l. 19-25; p. 113, l. 4-19]. Hebard testified that Reese seems to be saying that not a single one of the consumers had logged on to the radius server [Vol. IV, Ex. 260, *H Depo*, p 152, l. 12-25; p. 153, l. 21 - p. 154, l. 11]. Jeff Fritz, Hebard's financial officer, notified Eisenberg and Hebard in November 1999 that the Starnet/Megapop invoice for October showed there were only 75 unique log-ons [Vol. I, Ex. 80, E 20728; Vol IV, Ex. 260, *H Depo*, p. 141, l. 11-14, p. 143, l 2-7]. Hebard thought 75 was a low number [Ex. 260, *H Depo*, p. 143, l. 7]. In October 1999, defendants' database shows that they billed approximately 74,000 customers [Vol VI, Ex. 302, Tobin Dec, ¶ 17] Although usage by EPV subscribers was low, Eisenberg and Hebard never deferred billing consumers until they had logged on to the Internet [Vol. IV, Ex. 260, *H Depo*, p. 155, l. 25 - p. 156, l. 3; Vol. IV, Ex. 262, *E Depo*, p. 167, l. 7-17] Eisenberg

---

service [Vol IV, Ex. 260, p 157, l. 2-11]

recalls a suggestion was made to discontinue billing consumers after a certain period if those subscribers had not logged on to the Internet, but that suggestion was not acted upon [Vol. IV, Ex. 262, *E Depo*, p. 172, l 17-23].

Ample admissible evidence exists to support the FTC's three complaint counts. Therefore, Eisenberg's motion for summary judgment should be denied. Moreover, the evidence the FTC has submitted in support of its motion for summary judgment shows that no genuine issue of material fact exists.

IV. EISENBERG MISSTATES FTC LAW AND RAISES BOGUS DEFENSES.

A. Eisenberg Misstates and Misapplies FTC Deception Law.

Applying the proper legal standard established by the FTC Act is clearly a central component of this case. Eisenberg's summary judgment motion is based on the wrong legal standard. Section 5(a) of the FTC Act prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." 15 U S.C § 45(a) The legal standard for "deception" is distinct from the legal standard for "unfairness." In attempt to raise the standard of what the FTC must prove, the Eisenberg defendants' motion combines the two standards and misstates the FTC's burden in this action.

This case concerns *deceptive* business practices. The proper "deception" standard of the FTC Act involves only a showing of a representation, omission, or practice that is likely to mislead a consumer acting reasonably about a material fact. *See, e.g , FTC. v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001) (citations omitted). The Eisenberg defendants attempt to add to this burden by arguing that the FTC must also show that the injury to consumers was not reasonably avoidable [Eisenberg Memo, p. 1, l. 15 - p. 2, l 1, p. 15, l. 16-23]. The Eisenberg defendants

borrow this added hurdle from the FTC's "unfairness" standard; it has no role in the FTC's "deception" standard.[16]

At one point, Eisenberg incorrectly argues FTC must show that defendants caused harm to reasonable "relying" consumers [Eisenberg motion, p. 20, l. 16-17]. It is unclear what is meant by "relying" consumers, but under applicable law, the FTC does not need to show reliance by consumers [FTC motion for summary judgment, p. 17-18]. "It is well established with regard to Section 13 of the FTC Act (which gives district courts the power to order equitable relief) that proof of individual reliance by each purchasing customer is not needed." *FTC v. Figgie International, Inc* , 94 F.2d 595, 605 (9th Cir. 1993).

Eisenberg also argues that approximately 257,000 consumers who deposited the check and were billed acted unreasonably because "up to ninety five percent of all recipients necessarily understood and declined the offer." [Eisenberg motion, p. 20, l. 3-14].[17] The argument fails from its own deficiencies. First, there is no evidence showing how many consumers simply discarded the envelope, either before or after they opened it.[18] The relevant inquiry is how many consumers who opened the envelope noticed the disclosures Defendants' consultant, Dr. Howard Beales, agrees:

---

[16] The FTC unfairness standard is set forth in Section 5(n) of the FTC Act, which states that an "unfair" act or practice is one which "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U S C §45(n)

[17] Eisenberg contends that there were approximately 225,000 Cyberspace customers who were billed, citing a draft Lew Rose letter to the FTC he supposedly saw and a declaration he understood defendant Hebard was going to file in support of Hebard's motion for summary judgment [Eisenberg motion, p 4, l 19 - p. 5, l 5] However, defendants' customer service database for all four EPV subsidiaries contains billing records for approximately 257,000 consumers who were billed by defendants [Vol VI, Ex 302, Tobin Dec, ¶ 8].

[18] Erard Moore testified that he never learned the response rate for the Cyberspace solicitation He did testify that industry statistics suggested that the response rate for direct mail solicitations was between 1/4 and 5% [Vol X, Ex 269, p. 160, l 3-13]

> A key question here was did–**would people have read it at all in the first place? Or would they have simply deposited the check**? A mall intercept study is very difficult to get at–it's very difficult to get at that question in a mall intercept study. [Emphasis supplied]. [Vol. IX, Ex. 306, p 34, l. 18 - p. 36, l. 14].

Defendants claim there is a distinction between businesses and consumers, and that businesses should be held to a higher standard because it is "fair" to presume that they have more business knowledge and savvy than the average consumer [Eisenberg motion, p. 19, l. 8-9].[19] According to Dr. Beales, the issue is the same with respect to both consumers and businesses. [Vol. IX, Ex. 306, p. 34, l. 18 - p. 36, l 14]: can they even find the inconspicuous disclosures, or do they simply deposit the check without realizing that they are being signed up for internet-related services to be charged monthly to their telephone bills?[20]

Consumers are not unreasonable if they cannot find the terms of an offer buried in myriad lines of fine print on the back of a $3 50 check which, with its attached invoice-like form, appears to be a rebate or payment for services. As several deponents testified, they did not expect the terms of a contract to be in small print on the back of a check. Defendants' tiny print disclosures did not alert approximately 257,000 consumers that cashing or depositing the check would sign them up for a service that they did not know they were ordering, did not want, and, in

---

[19] Defendants state that the FTC has "informally" advised that it considers the fact that the promotion was targeted to businesses as evidence of deceptive intent [Eisenberg motion, p. 18, l 19-21]. First, defendants make this bald assertion without citation, so the FTC cannot respond Second, the FTC does not "informally advise" defendants The FTC does contend that many businesses simply deposited the checks, thinking that they were a rebate or refund or payment for some service, or because they did not see the inconspicuous terms of the offer

[20] Eisenberg's argument that businesses are more "savvy" than consumers and less likely to be deceived is undercut by his own counsel's experience with the "Chase" check Counsel who is litigating a deceptive solicitation check case should have been even more "savvy" than the average business–yet the Eisenberg legal team did not see the fine print that explained the check was not from Chase but from MemberWorks

many cases, could not even use because they had no computer.[21] These consumers collectively paid about $28 million dollars to defendants [Vol. VI, Ex. 302, *Tobin Dec*, ¶ 8].

B. Advice Of Counsel Is Not A Defense In An FTC Case.

Eisenberg references the role legal counsel played in reviewing the EPV subsidiaries' marketing material [Eisenberg Memo, p 7, l. 11-15]. "Advice of counsel" neither inoculates a defendant's business practices against a finding that those practices are deceptive nor shields an individual defendant from a finding that he is individually liable for the deceptive practices of corporate defendants. *See, e g , FTC v Amy Travel*, 875 F.2d 564, 575 (7th Cir. 1989) ("Obtaining the advice of counsel did not change the fact that the business was engaged in deceptive practices. . . [R]eliance on advice of counsel was not a valid defense on the question of knowledge; counsel could not sanction something that the defendants should have known was wrong."); *Orkin Exterminating Co v FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988) (Reliance upon counsel "irrelevant" to an action brought pursuant to section 5); *FTC v. Fax Corp of America, Inc* , 1990-2 Trade Cas. (CCH) ¶ 69,227 (D.N.J. 1990) ("A claim by defendants that they relied on the advice of counsel does not constitute a defense to allegations that they violated Section 5 of the FTC Act.").

C. Refunds Do Not Cure Deception.

In an apparent attempt to distract the Court from the true issue in this case– defendants' deceptive solicitation checks – Eisenberg argues that the EPV venture offered a money-back guarantee in their fine-print disclosures and provided a partial or full refund to thousands of

---

[21] Eisenberg states that some consumers and businesses who had high-speed access would nonetheless pay $19 95 or $29.95 for a Cyberspace email address [Eisenberg motion, n 6, affidavit, ¶ 13] Eisenberg is unable to point to a single such consumer. The hypothetical existence of satisfied customers has no bearing on the issue of whether defendants' business practices were deceptive under Section 5 of the FTC Act Satisfied customers are not a valid defense to an allegation of deception under Section 5 *See, e g , FTC v Amy Travel*, 875 F 2d 564, 574 (7th Cir 1989) (The existence of some satisfied customers "is not relevant to determining whether consumers were deceived "), *FTC v Gill*, 71 F.Supp 2d 1030, 1049 n 21 (C D. Cal 1999), *aff'd* 265 F 3d 944 (9th Cir 2001) ("Even assuming that defendants do have thousands of satisfied consumers, it does not excuse their violations of the law.").

consumers who challenged defendants' charge on their telephone bills [Eisenberg motion, p. 5, l. 11 - p. 6, l. 28]. This argument is irrelevant. A money-back guarantee or a refund does not cure business practices that are deceptive under Section 5 of the FTC Act. *See, e g., FTC v. Pantron I Corp* , 33 F 3d 1088, 1103 (9th Cir. 1994) (the existence of a money-back guarantee is not a defense); *Montgomery Ward & Co v. FTC*, 379 F.2d 666, 671 (7th Cir. 1967) (allowing a defense based on a money-back guarantee policy would make the false advertising prohibitions of the FTC Act "a nullity"); *FTC v. Wilcox*, 926 F.Supp 1091, 1100 (S.D. Fla. 1995) (In holding that defendants' refunds were irrelevant, the court quoted a passage from an FTC brief: "Whatever care defendants may have shown to soothe some complaining consumers . . . does not undo the deception by which the payment was obtained in the first place.").

In sum, under the deception standard, the FTC is not required to show consumers could have avoided injury Moreover, neither advice of counsel nor a money back guarantee is a defense to a Section 5(a) violation.

IV. EISENBERG WAS PERSONALLY INVOLVED IN THE EPV MARKETING MATERIAL.

In his motion, Eisenberg suggests that he was uninvolved in the marketing end of the EPV venture by stating that Hebard "obtained the mailing lists, created the promotions, had attorneys specializing in direct marketing review the materials, and arranged for mailing." [Eisenberg motion, p 4, l. 1-2; affidavit, ¶10]. Eisenberg also states that he did not see many of the promotions before they were mailed [affidavit, ¶ 15]. The facts show otherwise. Eisenberg was deeply involved in the marketing material, and he reviewed it before it was mailed. The solicitation check was his idea (n. 2, *supra* and Vol. V, Ex. 264, *R Depo*, p. 44, l. 13-23]. People working for Hebard faxed proposed solicitation checks and inserts to Eisenberg for his review and approval [Vol. IV, Ex. 260, *H Depo*, p. 91, l. 21 - p. 92, l. 13]. Hebard and his Director of Production, Buff Warne [Vol. IV, Ex. 260, *H Depo*, p 89, l. 25 - p 90, l. 1], asked Eisenberg to

review solicitations before they were mailed [Vol. I, Ex. 68, H 8806, Vol. IV, Ex. 260, *H Depo*, p. 92, l. 5-13].

a. Vol II, Ex. 146, H 8801, which is a draft Cyberspace solicitation check, includes a post-it with the message "Ian, This is a rough draft of the all in one check design. Chris said he thinks insert should be laid out as rules without art & to ask you–your thoughts?? Please advise. Buff" [Vol. IV, Ex 262, *E Depo*, p. 79, l. 20 - p. 80, l 11].

b. Vol. II, Ex. 146, H 8802, includes a handwritten note: "Ian, this is the consumer version of our check piece. Please review and advise any changes." [Vol. IV, Ex. 262, *E Depo*, p 80, l. 19-25].

c Vol. I, Ex. 68, H 8806, includes a handwritten note to Ian with instructions "please read and OK" [Vol. IV, Ex. 262, *E Depo*, p. 81, l. 15 - p. 82, l. 3].

d. Vol VIII, Ex. 147 is an email to "Ian" from Buff Warne asking for Eisenberg's comments on the consumer insert "Speak now or forever hold your peace Buff" Eisenberg responded and told Buff to "go ahead." [Vol. IV, Ex. 262, *E Depo*, p. 84, l. 9 - p. 85, l. 16].

Eisenberg discussed the marketing material with Hebard by telephone [Vol. III, Ex. 256, E Adm 45, 46; Ex 251, H Adm 29, 30, 31, 32, Vol. V, Ex. 264, *R Depo*, p 59, l. 15-23]. Eisenberg and Hebard communicated their decisions regarding the marketing material to those working on the marketing material by telephone, email, letter, post-it, and in person [Vol. IV, Ex. 262, *E Depo*, p. 179, l 19-25].

Eisenberg was also personally involved in deciding the quantities of solicitation checks to mail [Vol. IV, Ex. 260, *H Depo*, p. 95, l. 20 - p. 96, l. 6; p. 97, l. 2-4; Vol. IV, Ex. 262, *E Depo*, p. 85, l. 17 - p 86, l. 2; Vol. V, Ex 264, *R Depo*, p. 67, l. 7-12]. Eisenberg wanted to market

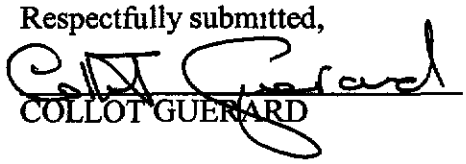
aggressively by sending out more mail, and he sometimes made the decision on the quantity to mail [Vol. II, Ex. 148, Vol. IV, Ex. 262, *E Depo*, p. 86, l. 6-7; p. 87, l. 9-24].

In short, Eisenberg's protestations regarding his limited involvement in the marketing material associated with the EPV venture are not accurate.

V. CONCLUSION.

The FTC has submitted admissible evidence with respect to each complaint count sufficient to defeat Eisenberg's motion for summary judgment. The motion should be denied. Moreover, the FTC's evidence is so overwhelming that there is no genuine issue of material fact As shown in its motion for summary judgment, the FTC is entitled to a judgment as a matter of law. Therefore, summary judgment should be granted in favor of the FTC.

Respectfully submitted,



COLLOT GUERARD

MICHAEL GOODMAN
Federal Trade Commission
600 Pennsylvania Ave. NW, Suite 238
Washington, DC 20580
202-326-3338 (office)
202-326-3395 (fax)
cguerard@ftc.gov (email)

March 25, 2002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25 day of March, 2002, a copy of the FTC's Opposition to Eisenberg Defendants' Motion for Summary Judgment was served via overnight delivery service, postage prepaid, upon the parties listed below:

Ernest Leonard, Esq.
Friedman & Feiger
5301 Spring Valley Road, Suite 200
Dallas, Texas 75254

Jane Jacobs, Esq.
Klein, Zelman
485 Madison Avenue, 15th Floor
New York, New York 10022

Collot Guerard
Attorney for Plaintiff

Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580
202-326-3338 (Ms Guerard)